ALGEMENE BANK NEDERLAND N.V.

v.

KACE ADVERTISING SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 2964 OF 1984]
22 APRIL 1988

BANKING: *Guarantee on overdraft facility - Whether extends to a loan facility granted by the same bank.*

The plaintiff bank's claim against the 1st defendant company was for the sum of RM31,841.06 being a small loan under the Small Loans Scheme (SLS) granted to the 1st defendant. The claim against the 2nd, 3rd and 4th defendants is as guarantors of all sums due and owing by the 1st defendant to the bank.

The 1st defendant denied that it had entered into a contract to borrow with the plaintiff, that it had no knowledge of the approval and crediting of the small loan into its current account and that in the alternative if the bank had in fact disbursed such a loan that the 1st defendant had not accepted the loan and that accordingly the claim is untenable and unenforceable.

The 2nd, 3rd and 4th defendants in their defence stated that the guarantee given by them did not cover the loan granted to the 1st defendant under the SLS. They agreed to indemnify the bank only in respect of overdraft facilities the bank had extended to the 1st defendant, that the amount owing under the overdraft facility had been fully paid and settled when the RM30,000 loan under the SLS was credited to the 1st defendant's current account.

Held:

[1] The suggestion that the 1st defendant was not aware of the approval nor the crediting of loan was unacceptable. The 2nd, 3rd and 4th defendant were the directors of the company and they had in the statement of defence conceded that the overdraft account of the 1st defendant was credited with RM30,000 from the Small Loan Scheme. The knowledge of the directors of a company who are the alter ego of the company is the knowledge of the company.

[2] The terms of the guarantee includes the obligation to pay on demand "all sums of money which are now or shall at any time be owing to the bank anywhere on any account whatsoever ...". The amount obtained under the Small Loan Scheme was an amount that would be owing to the bank and as such would be within the terms of the guarantee.

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 18 r. 19

For the plaintiff/appellant - Liza Chan; M/s. Yip Yeo & Nasrim
For the 1st defendant/respondent - Kan Weng Hin; M/s. C.H. Liew & Co.
For the 2nd, 3rd and 4th defendants/respondents - Belinda Tan; M/s. Gill & Tang

JUDGMENT

VC George J:

The plaintiff bank's claim against the 1st defendant as stated in the statement of claim is for "the sum of RM31,841.06 as at 29 February 1984 with interest thereon at 7.5% till date of settlement being in respect of 'SLS loan' facility of RM30,000 granted to the 1st defendant, full particulars of which are within the 1st defendant's knowledge." The claim against the

2nd, 3rd and 4th defendants is as guarantors "of all sums due and owing by the 1st defendant to the bank." "SLS" has reference to what is known as the Small Loans Scheme sponsored by the Government by which banks are allowed to lend money at rates of interest very much less than the prevalent rate of interest in ordinary bank loans.

The 1st defendant by its statement of defence denies having entered into any contract to borrow RM30,000 from the plaintiff and contends that it has no knowledge of the particulars of the alleged loan. By an amended statement of defence the 1st plaintiff pleads in the alternative to the effect that even if the bank had disbursed such a loan to the plaintiff there was failure on the part of the bank to comply with rules and regulations of the SLS loan scheme and that in any event the 1st defendant had not accepted the loan scheme and that accordingly the claim is untenable and is unenforceable.

The 2nd, 3rd and 4th defendants also delivered a statement of defence. They say that they did agree to indemnify the bank in respect of overdraft facilities the bank had extended to the 1st defendant "and nothing further". They contend that the amount owing on the overdraft operated under a current account was completely paid and settled on 7 May 1982 when the RM30,000 given as a small loan under the Small Loan Scheme (SLS Scheme) sponsored by the Government, was credited to the 1st defendant's current account. They contend that thereafter the overdraft facility was withdrawn. They contend that the guarantee given by them did not and not cover the loan granted to the 1st defendant under the SLS Scheme that was credited to the 1st defendant's overdraft account.

The bank took out what appears to be O. 14 and O. 18 r. 19 proceedings against all the defendants. An assistant manager of the bank, Mr. Kevin Suit, in a supporting affidavit contended that the bank had at various times granted to the 1st defendant various banking facilities including the overdraft facility enjoyed and operated under the current account. He pointed out that the 2nd, 3rd and 4th defendants had, by their letter of guarantee dated 14 August 1981, a copy of which he exhibited guaranteed "to pay and satisfy to the plaintiff on demand all sums of money which are now or shall at any time be owing to the plaintiff anywhere on any account withdrawn by the 1st defendant."

Mr. Suit went on to point out that it was the 1st defendant who in August 1981 had applied for the loan of RM30,000 under SLS Scheme which application was eventually approved. The RM30,000 on its being released was credited to the 1st defendant's current account. It was a loan from the plaintiff to the 1st defendant. Apparently the interest payable by the 1st defendant on the overdraft facility enjoyed on the current account was some 14.25% p.a. as opposed to 7.5% on the loan of RM30,000 on the SLS Scheme. It would seem that with the RM30,000 being made available, the amount overdrawn on the current account of the 1st defendant with the bank which was numbered no. 1266853 was reduced by RM30,000. The 1st defendant however was debited the RM30,000 under another account which is a loan account namely account no. 1279120.

The 2nd defendant who was managing director of the 1st defendant, by affidavit concedes that it was the 1st defendant who had applied for the SLS Scheme loan of RM30,000. He says that the 1st defendant had never been informed for the approval of the application and that accordingly, he contends, it cannot be said that the 1st defendant had accepted the loan and that there was accordingly no contract of loan in respect of RM30,000 under the SLS Scheme. He says that the guarantee was in respect of overdraft account No. 1266853 only which was "unilaterally cancelled by the plaintiff as on 7 May 1982". The loan account No. 1279120, according to the 2nd defendant, was established by the bank without his knowledge and without the approval of the 1st defendant. He also contends that the

application for the loan under the SLS Scheme was made by the 1st defendant without the knowledge of the 2nd, 3rd and 4th defendants. (I pause to note that this is indeed odd considering that according to a letter also exhibited by the 2nd defendant the 2nd, 3rd and 4th defendants were at all relevant times directors of the 1st defendant and he himself was the managing director). The 2nd defendant goes on to contend that the overdraft facility in account no. 1266853 having been "cancelled" the guarantors were thereby released from their guarantee.

Mr. Kevin Suit in a further affidavits in reply to the various affidavit of the 2nd defendant says that the 1st defendant was furnished with statements of accounts from time to time and exhibited copies of the same which included the statement in respect of account No. 1266853 as on 17 February 1984 when the account showed a nil balance and in respect of account No. 1297120 the May 1982 statements showing the debiting of the account with RM30,000 on 7 May 1982. The corresponding statement of account No. 1266853 shows as on 7 May 1982 the crediting of the account with RM30,000.

It is undisputed or cannot be disputed:

(i) that the 1st defendant had been banking with the plaintiff for a number of years and had successfully applied for the various banking facilities set out in its application letter dated 15 June 1981 - Exhibit FKS1 to encl. (17).

(ii) that the 1st defendant provided the bank with a letter of guarantee dated 14 August 1981 executed by its directors the 2nd, 3rd and 4th defendants the consideration for the guarantee being the bank making or continuing to make advances or otherwise giving credit ... to the 1st defendant.

(iii) that *inter alia* one facility provided by the bank to the 1st defendant by way of giving credit or making advances was allowing it to enjoy an overdraft facility in respect of its current account no. 1266853 with the bank up to RM30,000. In fact the account was overdrawn by RM30,996.50 as at 30 April 1982 and by 6 May 1982 it was overdrawn by RM43,837.94.

(iv) that it was the 1st defendant who by application dated 21 August 1981 formally applied to the plaintiff under the SLS Scheme for a loan of RM30,000.

(v) that the bank balances of the 1st defendant in respect of account No. 1266853 showed, most of the time, a credit balance. On the few instances that a debit balance was shown it was generally for very small amounts and if the debit balance went above RM10,000 the account was brought into credit without delay. This state of affairs went on until April and May 1982 when the account was overdrawn and was kept overdrawn and over the limit of RM30,000 until the said payment of RM30,000 into it on 7 May 1982.

(vi) that under the overdraft facility enjoyed under the account No. 1266853 interest payable was some 14.25% p.a. Under the SLS Scheme interest payable was only 7.5% p.a.

(vii) that in Clause 1 of the letter of guarantee was the provision that the guarantors would pay on demand all amounts owing by the 1st defendant to the plaintiff at any time anywhere on any account whatsoever.

The suggestion that the 1st defendant was not aware of the approval of the application under the SLS Scheme is unacceptable. As has been seen, the 1st defendant's account was overdrawn beyond the limit of RM30,000, which state of the account surely must, and in any event has to be deemed to, have been known by the Corporation. Even assuming that the bank had not formally notified the Corporation of the approval of the application, the

crediting of the current account with the RM30,000 could not have escaped the notice of the 1st defendant. The bank's transaction code for the item is 10 which has reference to "Local funds transfer" according to the "explanation of code numbers" that Cik Liza Chan drew my attention to Encik Kan suggested that the RM30,000 could have been a payment by one of the 1st defendant's customers. It is unlikely that such a payment would be a code 10 transaction. In any event it was for the defendants to show the source of RM30,000 being other than the SLS Scheme loan that the plaintiff has proved it to be by exhibiting the application, the crediting of the account and the debiting of the amount in the loan account. Further the 2nd, 3rd and 4th defendants have by their statement of defence conceded that the overdraft account of the 1st defendant was credited with RM30,000 loan from the SLS Scheme. The knowledge of the directors of a company who are the alter ego of the company is the knowledge of the company. Having utilised the RM30,000 the 1st defendant's contention that it had no knowledge of the approval of the loan or that it had not accepted it is completely devoid of merit and has to be is rejected.

The contention that in any event the bank had not adhered to the rules and regulations of the SLS Scheme was not developed and I assume that line was abandoned.

As to the guarantors, Clause 1 of the letter of guarantee clearly covers the SLS Scheme loan. The contention that their guarantee was only in respect of account no. 1266853 is inconsistent with the said Clause 1. The guarantors were at all relevant times the directors of the 1st defendant and should have known that in the event the SLS loan was obtained it was an amount that would be owing to the bank and as such would be within the terms of their letter of guarantee. The suggestion by the 2nd defendant that the 2nd, 3rd and 4th defendants were not aware of the application for the SLS loan is unacceptable. It was the 2nd defendant himself as managing director who implemented the application for the loan and 3rd and 4th defendants as directors of the company must be deemed to know what the 1st defendant company was doing, certainly in respect of its financial affairs. In any event by the terms of the guarantee their lack of knowledge of the successful application for the SLS Scheme loan does not do away with their obligation to pay on demand "all sums of money which are now or shall **at any time** be owing to the bank **anywhere on any account whatsoever ...**" (Emphasis provided).

The appeal had to be and was allowed with cost. The plaintiff bank was given leave to enter final judgment as prayed in prayer (a) of the summons encl. (12).

Also found at [1989] 2 CLJ 1000